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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/525,733	02/28/2005	Yoshitaka Nakajima	07241.0038	2552

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FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER
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901 NEW YORK AVENUE, NW
WASHINGTON, DC 20001-4413

EXAMINER

LAO, LUN S

ART UNIT	PAPER NUMBER
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2615

MAIL DATE	DELIVERY MODE
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11/27/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/525,733

Applicant(s)

NAKAJIMA ET AL.

Examiner

Lun-See Lao

Art Unit

2615

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 08 November 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).


4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.


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Continuation of 11. does NOT place the application in condition for allowance because: Applicant argued that lwata does not teach that a microphone being installed on a surface of the skin on the sternocleidomastoid muscle immediately below the mastoid of the skull, that is, in the lower part of the skin behind the auricle as recited in claim 1. Remarks, page 3, first paragraph. The examiner respectfully disagrees. lwata teaches detecting aural oscillation, including the use of a microphone 17 which is installed on the surface of the skin behind an ear (fig.2; col. 3 line 30-56). lwata specifically teaches that the position of microphone 17 is slidably adjustable along the back of the ear (via the retainer member 13 and the sliding rod 16, col. 3, lines 6-29), just like a typical adjustable length headphone. Therefore, one of ordinary skill in the art would realize that the adjustable range of lwata includes the location of the skin on the sternocleidomastoid muscle immediately below the mastoid of the skull, which is in the lower part of the skin behind the auricle. A user adjusting the length of a headphone is common practice. Therefore, the combined teaching of Holzrichter and lwata meets "microphone being installed on a surface of the skin on the sternocleidomastoid muscle immediately below the mastoid of the skull, that is, in the lower part of the skin behind the auricle" as recited in claim 1. Further, the sections of lwata cited by applicant (col. 3, lines 16-21 and figures 1 and 2) do not support applicant's characterization of lwata (Remarks, paragraph bridging pages 3 and 4). The sections describe the relationship of sliding rod 16, retainer member 13, microphone 17 and locking piece 18. It is noted that patent drawings are not necessarily drawn to scale, and there is no disclosure in lwata that precludes the configuration and dimensions of the sliding rod 16, retainer member 13, microphone 17 and locking piece 18 being such that the microphone is installed on a surface of the skin on the sternocleidomastoid muscle immediately below the mastoid of the skull. In fact, Figure 2 and col. 3, lines 16-21 of lwata show the location of microphone 17 relative to the locking piece 18 which is hooked on the upper portion of a user's ear, which is the same configuration as applicant's, as disclosed (see figure 1) and as claimed (see claim 3). Further, claim 1, an apparatus claim, only describes what the apparatus does (sampling one of a non-audible murmur, being installed on a surface) but not what it is (structural elements). While features of an apparatus may be recited either structurally or functionally, claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function. In re Schreiber, 128 F.3d 1473, 1477-78, 44 USPQ2d 1429, 1431-32 (Fed. Cir. 1997) "[A]pparatus claims cover what a device is, not what a device does." Hewlett-Packard Co. v. Bausch & Lomb Inc., 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990). In this case, the apparatus of Holzrichter and lwata is clearly capable of sampling one of a non-audible murmur and being installed on a surface as claimed.